

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

SABRINA E. PORTER, Personal Representative  
of the Estate of RICHARD SMITH, III,

Plaintiff-Appellee,

v

NORTHEAST GUIDANCE CENTER, INC., and  
MARY ELLEN GUIDO,

Defendant-Appellants.

---

UNPUBLISHED  
October 5, 2001

No. 213190  
Wayne Circuit Court  
LC No. 96-602956-NI

---

SABRINA E. PORTER, Personal Representative  
of the Estate of RICHARD I. SMITH,

Plaintiff-Appellee,

v

NORTHEAST GUIDANCE CENTER, INC., and  
MARY ELLEN GUIDO,

Defendant-Appellants.

---

No. 217974  
Wayne Circuit Court  
LC No. 96-602956-NI

---

SABRINA E. PORTER, Personal Representative  
of the Estate of RICHARD IRVIN SMITH, III,

Plaintiff-Appellee,

v

NORTHEAST GUIDANCE CENTER, INC., and  
MARY ELLEN GUIDO,

Defendant-Appellants.

---

No. 223647  
Wayne Circuit Court  
LC No. 96-602956-NI

---

SABRINA E. PORTER, Personal Representative  
of the Estate of RICHARD IRVIN SMITH, III,

Plaintiff-Appellee,

v

NORTHEAST GUIDANCE CENTER, INC., and  
MARY ELLEN GUIDO,

Defendant-Appellants.

---

No. 223648  
Wayne Circuit Court  
LC No. 96-602956-NI

Before: Sawyer, P.J., Murphy and Saad, JJ.

MURPHY, J. (*concurring in part, dissenting in part*).

I respectfully write separately because while in agreement with the majority opinion that there exists no basis on which to reverse the jury's liability determination, I additionally see no reason to question the jury's damage award.

Initially, I note agreement with the majority opinion that the alleged improper conduct of plaintiff's counsel in misrepresenting the record did not rise to a level establishing "a deliberate course of conduct aimed at preventing a fair and impartial trial." *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). I would also find, however, that the trial court did not abuse its discretion in admitting the Secretary of State pamphlet entitled "What Every Driver Should Know." See *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). The pamphlet was not introduced during plaintiff's case-in-chief, but rather during cross-examination of the defense expert witness. Further, the highlighted information in the pamphlet, referred to by plaintiff's counsel as illustrative of common sense guidelines to which all drivers should adhere, was consistent with the jury instructions regarding duty and standards of care. Accordingly, I find no basis on which to hold the pamphlet irrelevant. Of course, in the event my conclusion is mistaken and admission of the pamphlet was erroneous, for the same reasons I would nevertheless agree with the majority opinion that this error was harmless and does not merit reversal. MCR 2.613(A); MCL 769.26; MSA 28.1096. Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710-711; 550 NW2d 797 (1996), *aff'd* 457 Mich 593; 580 NW2d 817 (1998).

Where I dispositively diverge from the majority opinion is in consideration of the impact of the limited testimony concerning donation of the decedent's organs. Though I agree that the issue was irrelevant to the question of damages under the Wrongful Death Act, I find harmless the trial court's error in allowing the contested testimony. I would not reverse for a new trial on damages.

The contested testimony was elicited during examination of the decedent's grandmother, his sister and plaintiff, his mother. In response to defendants' objection to the initial mention of organ donation, on the basis that such evidence was irrelevant to damages under the statute, plaintiff's counsel stated that the testimony went to the witness grandmother's "state of mind," and suggested that it was "paramount to the issues of loss, society and companionship." Plaintiff's counsel further explained that the testimony was relevant to the decedent's grandmother's loss and "the way she copes with it and whatever effect it would have on her." Defendants' objection was overruled and the decedent's grandmother went on to testify that the donation of her grandson's organs made her "feel better" to "know a part of him would be living on." When the issue next arose, during examination of the decedent's sister, basic testimony concerning the organ donation went unchallenged, but defendants objected to a question regarding whether the witness was present when the organs were harvested. Plaintiff's counsel responded to the objection by stating "It's for what she went through, loss of love, care and affection. It shows what she experienced . . . ." This time the court sustained the objection and plaintiff's counsel moved on. Finally, when the issue was raised for the last time during plaintiff-mother's testimony, defendants made no objection to the general testimony and the decedent's mother went on to testify that the loss she felt was not lessened by the knowledge that a part of her son lived on. These three brief instances of testimony constitute the only mention of the issue of organ donation, aside from the unobjected-to references to the circumstance during plaintiff's opening statement and closing argument.<sup>1</sup>

Under the Wrongful Death Act, MCL 600.2922(6); MSA 27A.2922(6), damages the jury considers fair and equitable, under all the circumstances, may be awarded for, amongst other things, "the loss of financial support and the loss of the society and companionship of the deceased." The compensation provided under this element of the statute is "for the destruction of family relationships that result when one family member dies." *McTaggart v Lindsey*, 202 Mich App 612, 616; 509 NW2d 881 (1993), citing *Crystal v Hubbard*, 414 Mich 297, 326; 324 NW2d 869 (1982). Although specific factors to be accounted for are not identified, this Court has stated that "the only reasonable means of measuring the actual destruction caused is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship." *McTaggart, supra*, citing *In re Claim of Carr*, 189 Mich App 234, 239; 471 NW2d 637 (1991).

Pursuant to these principles, the grief and mental anguish of surviving family members is not to be compensated. Rather, the idea is to compensate survivors for the absence of those positive elements of the relationship that can no longer be enjoyed because of the decedent's death. Accordingly, because the reasons supporting admission of this evidence, proffered by plaintiff's counsel in response to the initial defense objection, are explicitly rejected by our case

---

<sup>1</sup> This trial occurred over seven days, with five days of testimony covering approximately five hundred and ten pages of transcript. Testimony concerning the donation of the decedent's organs is found on only seven pages.

law, the trial court erred in allowing the contested testimony.<sup>2</sup> Nevertheless, contrary to the majority opinion, I conclude that the references to organ donation were harmless and do not justify reversal of the damage award.

The majority opinion concludes that the evidence of organ donation was inherently prejudicial, noting that the issue was an emotional one that served no purpose but to inflame the passions of the jury and invoke the sympathies of the individual jurors. Though I agree that the issue of organ donation is emotional in nature, I am not convinced that the potential for an emotional reaction on the part of jurors prejudiced defendants in the form of an unjustly high damage award attributable to undue sympathy. It is equally plausible that individual jurors reacted in either of two alternative ways. Jurors could have limited an award believing that loss of society was tempered by the fact of the survivors' knowledge that parts of the decedent lived on in others (as the decedent's grandmother testified, she felt better knowing this). Jurors could also have attributed no effect to the limited testimony and argument, recognizing its lack of relevance to the issue of damages.

Moreover, the passage from plaintiff's closing argument cited by the majority opinion, which appears to be an unattributed poem or self-proclaimed eulogy, was presented during a rambling and unfocused introduction and was followed by reference to a credo held by Arthur Ashe, " . . . out of the night that covers me black as the pit from pole to pole. I thank whatever Gods may be for my unconquerable soul." It is likely that plaintiff's counsel recited these comments with an intent to appeal to jurors on some spiritual or emotional level, but speculation as to the possible prejudicial effect of the comments is purely that, speculation. When the time came to specifically argue the merits of damages, and to request particular amounts, there was no mention of the donation of decedent's organs. Absent any clear suggestion that plaintiff deserved greater damages based on the fact that her son's organs were donated, I am loathe to reverse a jury verdict of an otherwise valid and arguably appropriate damage award.

I would affirm the determination of liability and the award of damages.

/s/ William B. Murphy

---

<sup>2</sup> As the majority opinion notes, the issue of organ donation clearly is not relevant to either of the remaining bases for damages under the statute: medical, hospital, funeral and burial expenses; or pain and suffering of the deceased.